to a mere possibility would probably be taxable, and, likewise, immune from subsequent taxation if it had previously accrued by the testator's act of disposition. In any event, however, contingent remainders are by statute generally, to-day, freely alienable, devisable and also indestructible,[20] and must by virtue of these statutory attributes be considered property of a sufficiently valuable and definite nature to be immune from the retroactive force of such a statute as that in the principal case.[21]

"ACTIVE" OR "PASSIVE" NEGLIGENCE AS AFFECTING THE DOCTRINE OF THE "LAST CLEAR CHANCE."—The doctrine of the "last clear chance" cannot, it seems, be invoked in a case where the defendant has failed merely to discover the peril of a trespasser,[1] for in general there is no duty to anticipate his presence.[2] On the other hand, if the defendant, after discovering the peril,[3] fail to exercise ordinary care and injury results,[4] the application of this doctrine will almost universally support a recovery in favor of the injured party,[5] whether a trespasser or not.[6] Such a result seems logical, if the basis of the doctrine be found in the statement, enunciated in the earliest cases on the subject[7] and repeated many times since,[8] that the plaintiff's negligence will not excuse the defendant where the latter by the exercise of due care might have avoided the ensuing injury. The inevitable result of the literal acceptation of this statement as a test of liability, is that the "last

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[20]See 2 Reeves, Real Prop. § 904; N. Y. Real Prop. Law §§ 47, 49.

[21]See Executors of Eury *v.* State (1905) 72 Oh. St. 448; Ross, Inheritance Taxation § 37.

[1]See note to Southern Ry. Co. *v.* Bailey (1910) 27 L. R. A. [N. S.] 379.

[2]Burdick, Torts (2nd ed.) 458. But railroads may be required to keep a lookout for trespassers; certainly where their presence is to be anticipated. See note to Frye *v.* St. Louis etc. Co. (1906) 8 L. R. A. [N. S.] 1069; Beach, Contributory Negligence (3rd ed.) §§ 196-203.

[3]In the case of railroads the "peril" would not seem to arise until the actual nature of an object on the tracks were discovered or the presumption that a person would normally get off the tracks on the approach of a train were rebutted by the discovery of the actual situation. See note to Louisville etc. Co. *v.* Hathaway (1905) 2 L. R. A. [N. S.] 498; Beach, Contributory Negligence (3rd ed.) § 203.

[4]The defendant's neglect after the discovery of the peril is not distinguishable by many from wanton or wilful misconduct. Beach, Contributory Negligence (3rd ed.) § 55; Little *v.* Ry. Co. (1894) 88 Wis. 402.

[5]B. & O. R. R. Co. *v* Hellenthal (1898) 88 Fed. 116; Romick *v.* C. R. I. & P. Ry. Co. (1883) 62 Ia. 167; Denver etc. Co. *v.* Dwyer (1894) 20 Colo. 132; but see French *v.* Grand Trunk Ry. Co. (1904) 76 Vt. 441; Butler *v.* Rockland etc. Co. (1904) 99 Me. 149.

[6]For the duty of ordinary care is owed a trespasser after discovery of the peril. 1 Shearman & Redfield, Negligence (4th ed.) § 99; Ill. Cent. Ry. Co. *v.* Middlesworth (1868) 46 Ill. 494; but see Terre Haute etc. Co. *v.* Graham (1883) 95 Ind. 286.

[7]Davies *v.* Mann (1842) 10 M. & W. 545; Tuff *v.* Warman (1858) 5 C. B. [N. S.] 573.

[8]Radley *v.* L. & N. W. Ry. Co. (1876) L. R. 1 App. Cas. 754; Grand Trunk Ry. Co. *v.* Ives (1891) 144 U. S. 408, 429; see Pollock, Torts (8th ed.) 460 *et seq.*

clear chance" doctrine qualifies,[9] if it does not flatly deny[10] the doctrine of contributory negligence, for the defendant is held answerable without further inquiry as to the plaintiff's ability, also, to have averted the injury by the exercise of due care.[11] Indeed, the ultimate logic of this demands that where two parties are equally in fault, but either, by the exercise of ordinary care, might avoid the consequences of the carelessness of the other, each would be entitled to a recovery for the injury suffered.[12]

The doctrine of the "last clear chance" thus expressed has been supported, however, as a wise exercise of an humanitarian public policy.[13] Eliminating such considerations, it is obvious that to bring this doctrine into accord with the principles of contributory negligence, the failure of the defendant to exercise due care to avert an injury must be the proximate cause of that injury, to charge him with its results.[14] In the prevailing modern sentiment this has seemed the only function of the "last clear chance" doctrine,[15] though at the same time there is divergency of opinion as to the proximity of the defendant's misconduct to the injury complained of. For in all the cases in which the plaintiff's negligence has consisted solely in failing to discover his situation, he could have averted the accident if he had been conscious of it, and so to some courts his negligence has seemed as proximate as the act of a defendant who, after discovery of the peril, could also have prevented the injury by the exercise of proper care.[16] To the majority, however, the neglect of the defendant, supervening after his discovery of the peril, has seemed decisive in causing the injury.[17] The minority position is adopted in the recent case of *Nehring* v. *Connecticut Co.* (Conn. 1912) 84 Atl. 301 (dissenting opinion at 524) to the extent that recovery would be refused if the plaintiff's negligence actively continued up to the time of the accident, but allowed if his conduct at that time were "passive" and negligent only in that he did not awake to his surroundings.[18] But as the plaintiff in either case was unconscious of his peril, it is difficult to see how the proximity of that negligence

[9]Inland etc. Co. *v.* Tolson (1890) 139 U. S. 551, 558; 3 Harv. L. Rev. 263.

[10]Beach, Contributory Negligence (3rd ed.) § 10; Bishop, Non-Contract Law § 463, n. 2; C. B. & Q. R. R. Co. *v.* Lilly (Neb. 1903) 93 N. W. 1012.

[11]Beach, Contributory Negligence (3rd ed.) § 11.

[12]See Murphy *v.* Deane (1869) 101 Mass. 455.

[13]See 3 Harv. L. Rev. 263, 270; Hanlon *v.* Mo. Pac. Ry. Co. (1891) 104 Mo. 381; *cf.* also the "decisive cause" test. Pollock, Torts (8th ed.) 467.

[14]See 1 Shearman & Redfield, Negligence (4th ed.) § 99.

[15]Burdick, Torts (2nd ed.) 434; 16 Va. L. Reg. 161 *et seq;* Nashua etc. Co. *v.* W. & N. R. R. Co. (1882) 62 N. H. 159; Bostwick *v.* M. & P. Ry. Co. (1892) 2 N. D. 440.

[16]French *v.* Grand Trunk Ry. Co. *supra;* Butler *v.* Rockland etc. Co. *supra.*

[17]Ind. St. Ry. Co. *v.* Smith (1904) 35 Ind. App. 202, 211; Bostwick *v.* M. & P. Ry. Co. *supra;* 2 Cooley, Torts (3rd ed.) 1445. And if the plaintiff were unable to extricate himself from his perilous position, even by the exercise of due care, while the defendant could have averted the injury, the "last clear chance" rule would clearly support a recovery. Little *v.* B. & M. R. R. Co. (1903) 72 N. H. 61; 3 Harv. L. Rev. 263, 276.

[18]A directed verdict for the defendant was accordingly sustained on the ground that the plaintiff had been guilty of contributory negligence as a matter of law, by reason of his "active" negligence.

to the injury is in any way different when he remains quiescent in a position of peril, or when he continues to move along in a zone of peril, the actual risk in each case being the same. The distinction contended for might serve to determine when the actual "peril" arises,[19] but as a means of ascertaining the decisiveness of such negligence in the ultimate result it savors of the "degree" test of comparative negligence rather than of the "effect" test of contributory negligence.[20]

The dissenting opinion in *Nehring* v. *Connecticut Co.*, while repudiating the distincton between "active" and "passive" negligence, holds that the question of the plaintiff's contributory negligence was one for the jury, making no distinction between the defendant's negligent act after discovery of the peril and his negligence in merely failing to discover it. A similar confuson has led many jurisdictions to charge a defendant in a situation where both parties through neglect have failed to become apprised of the situation.[21] This result does not seem justifiable on principle, for when neither party has discovered the peril the breach of duty by each is the failure to exercise due care to discover it, and enforcement of liability against the defendant for his lack of viligance ignores the plaintiff's similar delinquency in this regard.[22] In the absence of a supervening act of discovery by either, the negligence of each is concurrent, and, it would seem, equally productive of the final result.[23] On considerations of policy, however, apart from principles of contributory negligence, a recovery should be had against a defendant engaged in the use of a dangerous instrumentality, by reason of the greater duty of care enjoined upon him.[24]

THE PRIVILEGE AGAINST SELF-INCRIMINATION AND THE POLICE POWER.—The privilege against self-incrimination is guaranteed by the United States Constitution, and by all but two of our State constitutions[1] with slightly varying language, but with the same general intent, to secure the individual from compulsory disclosure of his criminal guilt. The typical situation in which the immunity is invoked, is

[19]For the degree of activity in the conduct of the plaintiff may well have a different effect in bringing a realization of the danger home to the motorman. *Cf.* n. 3 *supra.*

[20]In Indiana the rule set forth in the principal case that "active" negligence on the part of the plaintiff would defeat a recovery, notwithstanding the want of care by the defendant after discovery of the situation, as enunciated in Robards *v.* Ind. St. Ry. Co. (1903) 32 Ind. App. 297, was apparently abandoned in a later case. Ind. St. Ry. Co. *v.* Bolin (1906) 39 Ind. App. 169. See 5 Mich. L. Rev. 143.

[21]Denver City Tramway Co. *v.* Wright (1910) 47 Colo. 366; P. & R. Ry. Co. *v.* Klutt (1906) 148 Fed. 818.

[22]Bourrett *v.* C. & N. W. Ry. Co. (1911) 152 Ia. 579; Dyerson *v.* U. P. R. R. Co. (1906) 74 Kan. 528.

[23]San Antonio Traction Co. *v.* Kelleher (1908) 48 Tex. Civ. App. 421; 16 Va. L. Reg. 161, 166.

[24]See Kolb *v.* St. L. Transit Co. (1903) 102 Mo. App. 143.

[1]In New Jersey and Iowa the rule is given full force as a part of the existing law, see State *v.* Zdanowicz (1903) 69 N. J. L. 619; State *v.* Height (1902) 117 Ia. 650.